No. 80-1347

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In The

Supreme Court of the United States

October Term, 1980

THOMAS G. DIORIO and PHILIP A DIORIO,

Petitioners,

vs.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of property without due process of law by reason of the fact that a judgment by default was entered against them without proper notification and without an opportunity to be heard on the merits (Fourteenth Amendment, United States Constitution)?

2. Whether the state nisi prius court deprived petitioners of property without due process of law by violating the New York statutory provisions governing entry of judgments of an unliquidated sum, by reason of the fact that it failed to hold a hearing on damages [Fourteenth Amendment, United States Constitution and New York CPLR §3215(a)]?

3. Whether petitioners were denied due process of law by the nisi prius court's action in entering a default judgment without notice to them, after they ceased to be represented by counsel, which counsel had to withdraw from the case by reason of illness (Fourteenth Amendment, United States Constitution)?

PARTIES

The parties in the New York Supreme Court, Appellate Division, Second Department were Kreisler-Borg Construction Co., Inc., plaintiff-respondent (respondent herein); Thomas G. Diorio and Philip A. Diorio, defendants-appellants (petitioners herein); and Elite Concrete Construction Corp., as well as Joseph L. Colosimo and Anthony R. Colosimo, defendants.

TABLE OF CONTENTS

Page

Questions Presented i

Parties i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ:

I. Petitioners were denied due process and equal protection of the laws in violation of the Fourteenth Amendment, by reason of the fact that a default judgment for a substantial amount of money was taken against them after their counsel became ill and withdrew from the case, and without notice to them of what was about to occur. 6

Conclusion 14

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Armstrong v. Manzo, 380 U.S. 545, 14 L. Ed. 2d 62 (1965) . 7, 8

Bell v. Burson, 402 U.S. 535, 29 L. Ed. 2d 90 (1971) 12

Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971) 11

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107 8

Dixon v. Alabama State Board of Education, 294 F. 2d 150, cert. denied, 368 U.S. 930, 7 L. Ed. 2d 193, 14 Ala. L. Rev. 126 (1961) 9

Ferguson v. Thomas, 430 F. 2d 852 (C.A. 5, Tex. 1970) 10

Fuentes v. Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, reh. den., 409 U.S. 902, 34 L. Ed. 2d 165 (1972) .. 10

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287 (1970) ... 12

Gonzales v. United States, 364 U.S. 59, 4 L. Ed. 2d 1569, 80 S. Ct. 1554, reh. den., 364 U.S. 856, 5 L. Ed. 2d 80 (1960) 10

Hovey v. Elliott, 167 U.S. 409, 42 L. Ed. 215 (1897) 9

Contents

Page

Jenkins v. McKeithen, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843, reh. den. 396 U.S. 869, 24 L. Ed. 2d 123 (1969) 13

McDonald v. Mabee, 243 U.S. 90, 61 L. Ed. 608 (1917) 7

Morgan v. United States, 304 U.S. 1, 82 L. Ed. 1129 (1938) . 9

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 94 L. Ed. 865 6

Nelson v. New York, 352 U.S. 103, 1 L. Ed. 2d 171 7

Perry v. Sinderman, 408 U.S. 593, 33 L. Ed. 2d 570 (1972) . 13

Re Ruffalo, 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222, reh. den. 391 U.S. 961, 20 L. Ed. 2d 874 (1968) 10

Robinson v. Hanrahan, 409 U.S. 38, 34 L. Ed. 2d 47 (1972) . 11

Schroeder v. New York City, 371 U.S. 208, 9 L. Ed. 2d 255 (1962) 7

Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L. Ed. 2d 349 (1969) 11

Stricklin v. Regents of University, 297 F. Supp. 416, app. dismd. (C.A. 7) 420 F. 2d 1257 (D.C. Wis., 1969) 13

Willner v. Committee on Character & Fitness, 373 U.S. 96, 10 L. Ed. 2d 224, 2 A.L.R. 3d 1254 (1963) 9

Contents

Page

Wisconsin v. Constantineau, 400 U.S. 433, 27 L. Ed. 2d 515 (1971) 12

Statutes Cited:

28 U.S.C. §1254 3

United States Constitution Cited:

Fourteenth Amendment ..... i, 3, 6, 12

Rules Cited:

New York CPLR §3215 3

New York CPLR §3215(a) ..... i, 14

APPENDIX

Order of the New York Supreme Court, Appellate Division, Second Department Dated December 9, 1980 ..... 1a

Order of the New York Supreme Court, Appellate Division, Second Department Dated September 9, 1980 ..... 2a

Order of the New York Supreme Court, Appellate Division, Second Department Dated May 19, 1980 ..... 3a

Opinion of Supreme Court of the State of New York, Westchester County 4a

No.

In The

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October Term, 1980

THOMAS G. DIORIO and PHILIP A. DIORIO,

Petitioners,

vs.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

OPINIONS BELOW

A copy of the nisi prius court's (New York Supreme Court, Westchester County) opinion is annexed as an appendix, as is the decision of the New York Supreme Court, Appellate Division, Second Department, published September 12, 1980 and December 10, 1980.

Opinions relevant to this petition are the opinion of the trial court per Justice Morrie Slifkin, dated December 20, 1979,

denying vacatur of the default judgment, and order of Justice Morrie Slifkin dated October 31, 1979, denying a motion to vacate the judgment of default; the order of the Appellate Division, Second Department, dated May 19, 1980, affirming the judgment of the Supreme Court, Westchester County; the order of the Appellate Division, Second Department, dated September 9, 1980, denying leave to appeal to the Court of Appeals; and, the order of the Appellate Division, Second Department, dated December 9, 1980, denying rehearing and reargument of the appeal of the order affirming the judgment of conviction and denying leave to appeal to the Court of Appeals, all appended.

JURISDICTION

(a) The judgment sought to be reviewed was dated the 29th day of October 1979. It granted on default a judgment in favor of respondent and against petitioners, in the amount of $71,765.45. A motion for reargument was made and granted by the Supreme Court, Westchester County, but upon reargument, the original determination that the default judgment should stand was adhered to.

(b) By order dated the 19th day of May 1980, the Appellate Division, Second Department, affirmed the judgment of the Westchester Supreme Court, without opinion. By order published September 12, 1980, the Supreme Court Appellate Division, Second Department denied reargument and rehearing of the order affirming the judgment of the Supreme Court, Westchester County, and also denied leave to appeal to the Court of Appeals.

By order published December 9, 1980, the Supreme Court Appellate Division, Second Department denied a rehearing and reargument of the order denying leave to appeal and denying a vacatur of the order published September 12, 1980.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment (Section 1):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York CPLR §3215, Default Judgment:

> "(a) *Default and entry.* When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of

rule 305, plus costs and interest. Upon entering a judgment against less than all defendants, the clerk shall also enter an order severing the action as to them. When a plaintiff has failed to proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the defendant may make application to the clerk within one year after the default and the clerk, upon submission of the requisite proof, shall enter judgment for costs. Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment."

STATEMENT OF THE CASE

A default judgment was entered against the petitioners in the Supreme Court, Westchester County on the 29th day of October 1979, awarding a judgment in favor of respondent, in the sum of $71,765.45.

A motion for reargument of the default judgment and application to vacate it was made and granted by Judge Slifkin of the Westchester Supreme Court, but on December 20, 1979, he adhered to his original determination and vacatur was denied.

The action in the complaint was upon a contract in which respondent sought recovery of so-called "back charges" arising out of an agreement entered into on August 6, 1961 between respondent, as general contractor on a project known as "Stuyvesant Apartment House", and the corporate defendant, Elite Concrete Construction Corp., wherein said defendant agreed to act as sub-contractor in the construction of a "concrete superstructure" at an agreed price of $302,000.

In connection with this agreement, the petitioners, and the aforesaid defendants, Anthony Colosimo and Joseph Colosimo, executed a purported guarantee of the corporate defendant's performance and completion of the work forming the subject of the agreement.

The corporate defendant received $297,549.01, representing nearly full payment of the contract, from the respondent herein.

Respondent, however, following completion of the work, withheld final payment and claimed an overpayment had been made to the corporate defendants by reason of its alleged failure to complete the contract.

In this connection, respondent commenced an action in May of 1963, against the corporate defendant, as well as against the petitioners Diorio, and the defendants Colosimo.

It was agreed, among the defendants, that a single lawyer would represent them all, which lawyer turned out to be Joseph C. Matera, Esq.

During the course of litigation, petitioners Diorio went to Puerto Rico in connection with a construction project, with the distinct understanding that the litigation would be actively defended.

During their residence in Puerto Rico, and while the litigation was progressing, their attorney, Matera, became ill and had to withdraw from the case. No attorney was substituted in their behalf and petitioners were completely unaware that they were unrepresented by counsel.

It was in this context that a default judgment was ultimately entered.

The court added to the injustice, despite the fact that the sum involved was an unliquidated amount. A hearing was required in the nature of an inquest, at the very least, before a judgment by default for damages could be awarded. It was therefore jurisdictionally defective.

REASONS FOR GRANTING THE WRIT

I.

Petitioners were denied due process and equal protection of the laws in violation of the Fourteenth Amendment, by reason of the fact that a default judgment for a substantial amount of money was taken against them after their counsel became ill and withdrew from the case, and without notice to them of what was about to occur.

Every person whose interests are involved in civil litigation is entitled, as of constitutional due process, to such notice of events taking place in their lawsuit as is reasonably calculated to apprise him of litigation. The Supreme Court of the United States in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 94 L. Ed. 865, 873, aptly said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 873 (1950).

Illustratively, the Supreme Court has invalidated an adoption decree for want of due process when a divorced father with visitation rights to his child was not notified of adoption proceedings affecting his child. Said the Court: "Failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law." *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 65 (1965).

The United States Supreme Court, through Justice Holmes, once ruled that the best possible form of substituted service must be used, if personal service is not made within the jurisdiction. Justice Holmes stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald v. Mabee*, 243 U.S. 90, 61 L. Ed. 608 (1917).

The Supreme Court has observed:

> "The general rule that emerges from the Mullane Case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder v. New York City*, 371 U.S. 208, 9 L. Ed. 2d 255, 259 (1962).

In the case at bar, a letter was sent, but was received by a person other than the petitioners herein and, consequently, we maintain that no notification was given that would conform to due process (*Nelson v. New York*, 352 U.S. 103, 1 L. Ed. 2d 171).

One of the most essential rights of any litigant or of any

person, is that he have his "day in court" and as a corollary to that, an opportunity to be heard, as a matter of right, *on the merits.*

The United States Supreme Court has referred to "the right to be heard" as "one of the most fundamental requisites of due process."[1] Again, it has stated: "A fundamental requirement of due process is the opportunity to be heard."[2]

When the Missouri court refused to hear a person on the merits of his claim by announcing a new rule that required prior recourse to an administrative agency, at a time when such appeals had already run, the United States Supreme Court held that the Missouri court had, in so repudiating its earlier position, "denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."[3] "It is plain," observed the court, "that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. . . . by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."[4]

When the Supreme Court of the District of Columbia attempted to deprive a defendant of his right to answer a suit

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1. *Schroeder v. New York City*, 371 U.S. 208, 9 L. Ed. 2d 255, 259 (1962).

2. *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 66 (1965).

3. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 1112 (1930).

4. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 1112, 1113 (1930).

brought against him, and struck his answer, then entered judgment against him, because of his refusal to deliver to a court-appointed receiver certain funds which were the subject of the litigation, a New York court refused to honor the judgment and it was affirmed by the United States Supreme Court which ruled that the first court had deprived the defendant of his property without due process of law by denying him his constitutional right to a day in court.[5]

One who has passed a bar examination is entitled to a fair hearing before being denied membership in the state bar.[6]

The Court of Appeals for the Fifth Circuit has ruled that due process of law requires that a student be given notice and hearing before being expelled from a state institution.[7]

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right might be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposal before it issues its final command.[8] At times, however, parties in litigation with the federal government may be denied access to

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5. *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215 (1897).

6. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. Ed. 2d 224, 2 A.L.R. 3d 1254 (1963).

7. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150, *cert. den.* 368 U.S. 930, 7 L. Ed. 2d 193, noted in 14 Ala. L. Rev. 126 (1961).

8. *Morgan v. United States*, 304 U.S. 1, 82 L. Ed. 1129 (1938).

government papers and documents affecting the case. Thus, in a five-to-four 1960 decision, the Supreme Court ruled that failure to allow an applicant for a conscientious objector classification to have a view of the FBI report and of the hearing officer's report did not deny him due process of law.[9] According to Chief Justice Warren, and Justices Black, Brennan and Douglas, the party's "right to a full hearing" was denied by such refusal.

What is constitutionally mandated as part of procedural due process in civil situations will vary from one kind of proceeding to another. "The nature of the process that is due is not subject to rigid definition," says one federal court. Another adds: "The standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson v. Thomas,* 430 F. 2d 852 (C.A. 5, Tex. 1970).

The Supreme Court has said that disbarment is a penalty imposed upon a lawyer, adding: "He is accordingly entitled to procedural due process, which includes fair notice of the charge." *Re Ruffalo,* 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222, *reh. den.* 391 U.S. 961, 20 L. Ed. 2d 874 (1968).

It is "fundamental," says the Supreme Court, "that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, *reh. den.* 409 U.S. 902, 34 L. Ed. 2d 165 (1972).

The Supreme Court held in 1972 that a state had failed to provide notice "reasonably calculated" to apprise a citizen of litigation affecting his interests, when in instituting forfeiture

9. *Gonzales v. United States,* 364 U.S. 59, 4 L. Ed. 2d 1569, 80 S. Ct. 1554, *reh. den.* 364 U.S. 856, 5 L. Ed. 2d 80 (1960).

proceedings it sent notice to the person's home, when the state knew the person was in jail at the time, and it was undisputed that the person incarcerated did not receive the notice sent to his home. *Robinson v. Hanrahan,* 409 U.S. 38, 34 L. Ed. 2d 47 (1972).

The Supreme Court reminds us that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The notice and hearing, says the Court, must be "appropriate to the nature of the case," adding: "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits." By way of illustration, the Court suggests that a state can enter a default judgment "against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication." The Court further states that "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." So stating, the Court ruled that due process was violated when indigents in Connecticut were unable to sue for divorces because of state requirements that they pay filing and service fees. *Boddie v. Connecticut,* 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971).

Garnishment laws are unconstitutional as violative of due process when they deprive a worker of the use of his earned wages at the suit of a claimed creditor without notice and an opportunity to be heard before such wages are tied up or turned over to the claimed creditor.[10]

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10. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 23 L. Ed. 2d 349 (1969).

A state which terminates public assistance payments to a recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. The Court added that the recipient had the right to present evidence orally and to cross-examine adverse witnesses, and, finally, that the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing.[11]

The Supreme Court has held that a citizen has the right to notice and hearing before his name is posted, under a state statute, as one to whom liquor can not be sold nor given.[12]

The Court in 1971 held that a state may not deprive a citizen of his driver's license and vehicle registration without first providing him with a hearing to include determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.[13]

A federal court has held that when university officials have reasonable cause to believe that danger will be present if a student is permitted to remain on campus pending a decision following a full hearing, an interim suspension may be imposed, but "an interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process

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11. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970).

12. *Wisconsin v. Constantineau*, 400 U.S. 433, 27 L. Ed. 2d 515 (1971).

13. *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90 (1971).

requires that he be provided such a preliminary hearing at the earliest practical time." *Stricklin v. Regents of University*, 297 F. Supp. 416, 420, *app. dismd.* (CA7) 420 F. 2d 1257 (D.C. Wis., 1969).

The Supreme Court has indicated that a non-tenured teacher may have a "property" right that entitles him to procedural due process, including a hearing, before school authorities indicate the relationship is terminated, if he can show "a legitimate claim of entitlement to job tenure" as by proof that there is an unwritten "common law" at the particular educational institution that employees shall have the equivalent of tenure. *Perry v. Sinderman*, 408 U.S. 593, 33 L. Ed. 2d 570 (1972).

The Court of Appeals for the Fourth Circuit has said that "continuous employment over a significant period of time—such as appellant's 29 years—can amount to the equivalent of tenure. When it does, dissolution of the relationship requires prior notice and an opportunity to be heard."

The Supreme Court has said that "the right to present evidence is, of course, essential to the fair hearing required by the due process clause." *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843, *reh. den.* 396 U.S. 869, 24 L. Ed. 2d 123 (1969).

In the case at bar it must be borne in mind that the petitioners were away in Puerto Rico when their lawyer, Matera, became ill and withdrew from the case. They were unaware of the fact that they no longer had representation and, consequently, their interests in the litigation was no longer being protected. The notification allegedly sent and received by a relative of petitioners was inadequate notification because it was sent to Puerto Rico and petitioners had already left.

The deprivation of counsel in itself was so egregious as to warrant the granting of certiorari in itself, let alone the other issues involved herein.

Finally, the court at nisi prius arrogated to itself the right to enter a default judgment on an unliquidated sum without a hearing or inquest, and this, too, was jurisdictionally defective under the CPLR §3215(a).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED DECEMBER 9, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 9, 1980.

Hon. Lazer, Justice Presiding.
Hon. Gibbons
Hon. Rabin
Hon. O'Connor,
Associate Justices.

KREISLER-BORG CONSTRUCTION CO., INC.,

Respondent,

v.

ELITE CONCRETE CONST. CORP.,

Defendant-Appellant.

Motion by appellant for leave to appeal to the Court of Appeals from an order of this court dated Sept. 9, 1980, which denied reargument of the appeal from an order of the Supreme Court, Westchester County, entered Dec. 21, 1979, which was affirmed by order dated May 19, 1980.

Motion denied, with $20 costs.

ENTER

Clerk, Appellate Division.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED SEPTEMBER 9, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 9, 1980.

Hon. Lazer, Justice Presiding.
Hon. Gibbons
Hon. Rabin
Hon. O'Connor,
Associate Justices.

KREISLER-BORG CONSTRUCTION CO., INC.

Respondent,

v.

ELITE CONCRETE CONSTRUCTION CORP.,

Defendant.

Motion by appellants (1) for reargument of the appeal from an order of the Supreme Court, Westchester County, entered Dec. 21, 1979, or in the alternative (2) for leave to appeal to the Court of Appeals from an order of this court, dated May 19, 1980, which decided the appeal. Motion denied, with $20 costs.

ENTER

Clerk, Appellate Division.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED MAY 19, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 19, 1980.

HON. LAZER, Justice Presiding.
HON. GIBBONS
HON. RABIN
HON. O'CONNOR

Associate Justices

KREISLER-BORG CONST. CO., INC.,

Res.

v.

ELITE CONCRETE CONST. CORP.,

Def.

Appeal by appellants from an order of the Supreme Court, Westchester County, entered the 29th day of October, 1979, granting a default judgment in favor of plaintiffs against appellants affirmed.

ENTER

s/ Irving N. Selkin
Clerk of Appellate Division

OPINION OF SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY

SUPREME COURT — STATE OF NEW YORK
SPECIAL TERM, PART I, WESTCHESTER COUNTY

Present:
Hon. MORRIE SLIFKIN
Justice

KREISLER-BORG CONSTRUCTION CO., INC.

Plaintiff,

-against-

ELITE CONCRETE CONSTRUCTION CORP., PHILIP A. DIORIO, THOMAS G. DIORIO, JOSEPH L. COLOSIMO and ANTHONY R. COLOSIMO,

Defendants.

INDEX
NUMBER 9072, 1964

MOTION
DATE 10/30, 1979

MOTION
CAL. NUMBER 16

The following papers numbered 1 to 6 read on this motion to open a default judgment entered October 29, 1979.

Opinion

PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits	1-2
Answering Affidavits	4
Replying Affidavits	6
Pleadings — Exhibits — Stipulations — Minutes	3, 5

Upon the foregoing papers it is ordered that this motion is denied. Upon the papers submitted on this motion, the Court remains unconvinced that the default was excusable. Even if not willful, the default was the result of callous disregard for the workings of the judicial system. Movant's reliance upon an alleged oral understanding that a co-defendant's attorney would protect his interests is an unsupported, self-serving declaration that, even if true, would not serve as a reasonable excuse. Moreover, defendant's failure to recollect whether he was served with the order relieving his then counsel because of counsel's illness, his failure to even inquire as to the outcome of this litigation and his failure to explain his exact whereabouts during the intervening years militate against the Court's exercise of discretion with respect to this motion.

So Ordered.

Dated: Oct. 31, 1979

MORRIE SLIFKIN, J.S.C.